STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 16, 2014
v	No. 310803 Wayne Circuit Court
ROBERT REED, JR., Defendant-Appellant.	LC No. 11-010199-FC

Before: SAAD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a), and one count of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(a).[1] Defendant was sentenced as a fourth habitual offender, MCL 769.12, to a prison term of 320 months to 120 years for the CSC III convictions and to time served for the CSC IV conviction. We affirm.

I. BASIC FACTS

The victim, a 15-year-old girl, testified that she was walking home from school when defendant first approached her in a car and offered her a ride. Defendant approached her two more times on foot and then approached her with a gun, forced her to walk down an alley to a vacant home. He then forced her to perform fellatio on him and submit to vaginal penetration. DNA evidence from the rape kit matched defendant.

Defendant represented himself at trial with advisory counsel and testified that he met the victim through a mutual friend, that he paid the mutual friend $50 to watch the victim perform fellatio on the mutual friend, and that he masturbated and ejaculated on the victim while

[1] The jury acquitted defendant of charges of kidnapping, MCL 750.349, two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b, second-degree criminal sexual conduct (CSC II), MCL 750.520c, felon in possession of a firearm, MCL 750.224f, assault with a dangerous weapon, MCL 750.82, and felony firearm, MCL 750.227b.

watching. Defendant claimed that the victim was angry that he did not pay her $50, but only paid the mutual friend.

The jury acquitted defendant of multiple charges, but convicted him of two counts of CSC III and one count of CSC IV. He was sentenced as outlined above and now appeals as of right.

II. JUDICIAL NOTICE AND JUDICIAL MISCONDUCT

Defendant represented himself throughout the proceedings, including during closing arguments. In his closing, defendant stated that he never denied the DNA evidence. On appeal, defendant argues that the trial court abused its discretion when the trial court sua sponte took notice of defendant's request for a DNA expert. In so doing, defendant maintains that the trial court assumed the prosecutor's role and, thereby denying defendant the right to a fair trial. We disagree.

A trial court's decision to take judicial notice of an adjudicative fact is reviewed for an abuse of discretion. MRE 201(c)*; Lenawee Co v Wagley*, 301 Mich App 134, 149; 836 NW2d 193 (2013). Claims of judicial misconduct are reviewed to determine whether the court's comments evidenced partiality and could have influenced the jury to the defendant's detriment. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). "A defendant in a criminal trial is entitled to expect a neutral and detached magistrate." *Id.* "The test is whether the judge's . . .comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case." *Id.*

During his closing argument, defendant argued that he never denied the DNA evidence, but the trial court struck his statement. When defendant again said that he did not deny the DNA, the trial court interrupted again and dismissed the jury, stating, "Am I losing my mind, or is this the case where he asked for a DNA expert?" She then instructed the prosecution that the order granting defendant's request for a DNA expert was in the court file and that the prosecution could use it. The trial court took judicial notice of defendant's request for a DNA expert, made a record outside the jury's presence that it would not allow defendant to lie in court regarding his challenge to the DNA evidence, and instructed the jury that it had taken judicial notice of the DNA evidence.

A trial court may take judicial notice of any adjudicative fact that is not subject to reasonable dispute whether the court has been requested to do so or not. MRE 201(b) and (c). Further, judicial notice may be taken at any stage of the proceeding, MRE 201(e), and a jury in a criminal trial must be instructed that it may, but is not required to, accept as conclusive any fact judicially noticed, MRE 201(f). Here, without being asked to do so, the trial court took judicial notice of the fact that defendant requested a DNA expert at some point before trial.

Defendant does not argue that he did not request a DNA expert or that the jury was improperly instructed. Instead, defendant argues that the trial court overstepped its bounds in order to help the prosecution and that, because the action took place during his closing, he did not have the opportunity to respond to the trial court's action.

However, MCL 768.29 provides:

> It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved. The court shall instruct the jury as to the law applicable to the case and in his charge make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require. The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.

Similarly, MCR 2.513(B) requires a trial court to "control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court."

Here, the trial court made it very clear that it believed its duty was to insure ascertainment of the truth and, therefore, it would not allow defendant to argue in closing that he never denied the DNA evidence where he requested a DNA expert. On the whole, it cannot be said that the trial court abused its discretion in taking judicial notice of a proper fact where the trial court made fair comment on the evidence. The comments did not evidence partiality; rather the trial court sustained objections by the prosecution and instructed defendant that he could not testify during closing arguments. While it may be argued that some of the comments made by the trial court judge while the jurors were removed may have evidenced partiality, the comments could not have affected the jurors to defendant's detriment.

III. RIGHT TO COUNSEL

Next, defendant argues that the matter must be remanded for resentencing where the trial court erred by failing to advise him of his right to counsel before sentencing as required by MCR 6.005(E). The prosecution concedes that the trial court failed to so advise defendant. We agree that the trial court clearly erred in failing to advise defendant of his continuing right to counsel at sentencing, but conclude that the error was harmless.

For purposes of review, failure to comply with MCR 6.005(E) is to be treated as any other trial error. *People v Lane,* 453 Mich 132, 140; 551 NW2d 382 (1996); see also *People v Willing*, 267 Mich App 208, 224-225; 704 NW2d 472 (2005) (harmless error standard does not apply in a situation where a defendant's *initial* wavier of right to counsel is invalid, but may apply to waivers at *subsequent* proceedings.). Unpreserved, nonconstitutional errors are reviewed for plain error affecting substantial rights. *Lane,* 453 Mich at 140.

Once a defendant has waived his right to counsel, MCR 6.005(E) requires that at subsequent hearings, including sentencing, the trial court must advise the defendant of his continuing right to a lawyer's assistance. The defendant must then either reaffirm that a lawyer's assistance is not wanted, MCR 6.005(E)(1), or request a lawyer, MCR 6.005(E)(2) and (3). If the defendant requests a lawyer, the court must allow the defendant a reasonable opportunity to

retain a lawyer or, if the defendant cannot afford the services of a lawyer, appoint one to assist the defendant. Here, the trial court failed to follow this procedure at sentencing and therefore plainly erred.

Our Supreme Court specifically addressed this issue in *Lane*, 453 Mich 132. In *Lane*, as here, the trial court plainly erred when it failed to advise the defendant of his right to counsel at the habitual offender hearing and sentencing. The *Lane* Court determined that the test was whether the error was prejudicial to the defendant and whether it affected the outcome of proceedings. In *Lane*, the defendant did not allege any prejudice and, therefore, the *Lane* Court found that there was no plain error affecting substantial rights. *Id.* at 141-142. Here, defendant also has not argued that the error was prejudicial. Therefore, under *Lane*, there was no plain error affecting substantial rights, and this Court must affirm defendant's sentence.[2]

IV. SCORING ERRORS

Lastly, defendant argues that the trial court erred in scoring offense variables (OV) 1 and 2, which account for use of a weapon during the commission of the sentencing offenses, because the jury found defendant not guilty of gun possession charges. *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348, 2354-2366; 147 L Ed 2d 435 (2000) (The Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt). We disagree.

Defendant acknowledges that our Supreme Court has previously determined that the Michigan sentencing scheme is not affected by the holding in *Apprendi* because "(a)s long as the defendant receives a sentence that is within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *People v Drohan*, 475 Mich 140, 163-164; 715 NW2d 778 (2006). Nonetheless, defendant expressed the hope that the United Supreme Court would reverse *Apprendi* in deciding *Alleyene v United States*, ___ US ___; 133 S Ct 2151, 2158; 186 L Ed 2d 314 (2013).[3]

In *Alleyene*, the Court determined that, to be consistent with *Apprendi*, facts that increase the statutory mandatory *minimum* sentence are elements of the charged offense and must be submitted to the jury and found beyond a reasonable doubt. *Alleyene*, 133 S Ct at 2158. This Court has recently addressed the issue:

> We hold that judicial fact-finding to score Michigan's guidelines falls within the "'wide discretion'" accorded a sentencing judge "'in the sources and types of evidence used to assist [the judge] in determining the kind and extent of

[2] Defendant also argues that his re-sentencing should be remanded to a different judge because the trial court evidenced partiality in sentencing him. Because we affirm defendant's sentence, this issue is moot.

[3] *Alleyene* was decided after defendant filed his appellate brief.

> punishment to be imposed within limits fixed by law.'" *Alleyne*, 570 US at ___ n 6; 133 S Ct at 2163 n 6, quoting *Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949). Michigan's sentencing guidelines are within the "broad sentencing discretion, informed by judicial factfinding, [which] does not violate the Sixth Amendment." *Alleyne*, 570 US at ___; 133 S Ct at 2163. [*People v Herron*, ___ Mich App ___; ___ NW2d ___ (Docket No. 309320, issued December 12, 2013) slip op p 7.]

The Michigan Supreme Court's ruling in *Drohan* clearly extends to *Alleyene* as the state sentencing scheme does not affect the statutory mandatory minimum. Therefore, Michigan's sentencing scheme is constitutional under *Apprendi* and *Alleyene* and defendant is not entitled to resentencing.

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly